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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-717

ALEXANDER J. ANTOINE and IRENE F. ANTOINE, his wife,
Appellants,
v.
THE STATE OF WASHINGTON,
Respondent.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

Office and Post Office Address:
3101 Seattle-First National
Bank Building
Seattle, Washington 98154
Telephone (206) 623-1255

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CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

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APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLANTS

Appellants, who are Indians, were convicted of violating game laws of the State of Washington. They appeal from the Judgment of the Supreme Court of the State of Washington, entered July 12, 1973, confirming the judgment of conviction in the Superior Court for Ferry County, State of Washington, Cause No. 4859, signed and entered by the Honorable Richard J. Ennis on May 16, 1972, and filed May 18, 1972.

OPINIONS BELOW

The opinion of the Washington State Supreme Court is reported at 82 Wn.2d 440, 511 P.2d 1351 (1973), and is

reprinted in the Single Appendix at page 18. The Superior Court's findings, judgment and sentence are not reported, but are reprinted in the Single Appendix at pages 12 and 15. The judgment appealed from (being the Remittitur of the State Supreme Court dated August 12, 1973) is reprinted in the Single Appendix at page 36.

JURISDICTION

Alexander Antoine, a Colville Indian, shot a deer on land which was formerly part of the Colville Indian Reservation. Mr. Antoine and his wife Irene were charged with violation of state laws which prohibit taking and possession of deer during closed seasons.

They were tried, convicted and sentenced to jail terms. A timely appeal was taken to the State Supreme Court. On July 12, 1973, that court affirmed and expanded the decision of the trial court by rendering a written opinion upholding the lower court's decision.[1]

On August 12, 1973, the Washington Court issued its Remittitur[2] to the trial court, which is ıe judgment enforcing its written opinion.[3]

On September 19, 1973, appellants filed in the Washington Supreme Court, a notice of appeal to the Supreme Court of the United States.[4]

Jurisdiction of the Supreme Court to review the judgment below by direct appeal is conferred by 28 U.S.C. § 1257(2) which reads in part:

1. Single App. p. 18.
2. Single App. p. 38.
3. RCW 2.04.170, Supreme Court Administrative Rules, Rule 15.
4. R. 84.

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Metlakatla v. Egan*, 369 U.S. 45 (1962);[5] *United States v. Winans*, 198 U.S. 371 (1905); *Tulee v. Washington*, 315 U.S. 681 (1942).

QUESTIONS PRESENTED

1. Where an Indian tribe cedes lands of its reservation to the United States by agreement, may the federal government reserve hunting rights for the Tribe in the ceded area?

2. When former Indian lands become part of a state, does the state take the land subject to rights previously reserved on such lands for Indians by the United States?

3. Did the federal government by the agreement of 1891 and the act of June 21, 1906, reserve hunting rights to the Colville Indians on their former reservation?

4. Where the United States has declared that hunting rights of the Colville Indians "in common with all other

5. *Metlakatla* is analogous to the present case. There, the Indians claimed that they were immune from state wildlife laws as applied to them on the grounds that such laws were repugnant to the Supremacy Clause, federal statutes and secretarial orders. Here, appellants allege that state law is repugnant to the Supremacy Clause, federal statutes and executive orders. *Metlakatla* held that appeal was the appropriate remedy. *Metlakatla, supra*, p. 50.

persons . . . shall not be taken away or in any wise abridged," may the State of Washington abridge, impair or regulate such rights?

STATUTES AND FEDERAL LAWS INVOLVED

United States Constitution, Article 1, section 8, clause 3 (Indian Commerce Clause).[6]

United States Constitution, Article VI, clause 2 (Supremacy Clause).[7]

Executive Order of July 2, 1872 (1 Kapp. 916).[8]

Agreement of 1891.[9]

Act of June 21, 1906, 34 Stat. 325, at 377 (3 Kapp. 193, at 245).[10]

Act of March 1, 1907, 34 Stat. 1015, 1050-1051 (3 Kapp. 266, 302).[11]

Revised Code of Washington, Section 77.16.020[12] and Section 77.16.030.[13]

STATEMENT

On September 11, 1971, Alexander Antoine and his wife, Irene,[14] shot and killed a deer in what is now Ferry County, Washington. On that date, the hunting season for deer in

6. App., p. A-1.
7. App., p. A-1.
8. Single App., p. 3.
9. Single App., p. 4.
10. App., p. A-1.
11. App., p. A-2.
12. App., p. A-2.
13. App. p. A-3.
14. Irene Antoine is also an Indian, but not an enrolled member of the Confederated Tribes.

that particular area was closed.[15] The area in which the deer was shot, however, was within the boundaries of the original Colville Indian Reservation as established by an 1872 Executive Order.[16]

The Colville Confederated Tribes comprise eleven separate tribes and bands of Indians who formerly occupied large areas of Western Washington. They were placed on the Colville Indian Reservation in 1872 by Executive Order of the President.[17] The tribes are recognized by the United States Government, Bureau of Indian Affairs and are governed by a Constitution and By-Laws approved by the Secretary of the Interior on December 26, 1938. Of the 5,340 enrolled members of the tribes, approximately half live on the Colville Indian Reservation which encompasses 1.3 million acres and is governed by the 14-member Colville Business Council. Alexander Antoine is an enrolled member of the Tribes.[18]

The land involved in this case had been ceded back to the United States Government by the various bands and tribes of the Colville Confederation by agreement with the United States in 1891.[19] That agreement provided in part:

> It is stipulated and agreed that the lands to be allotted as aforesaid to said Indians and the improvements thereon shall not be subject, within the limitations prescribed by law, to taxation for any purpose, national, state or municipal; that said Indians shall enjoy without let or hindrance the right at all times freely

15. R. 50.
16. R. 50.
17. Executive Order of July 2, 1872; (1 Kapp. 916), Single App. p. 3.
18. R. 51.
19. Single App., p. 4.

> to use all water power and water courses belonging to or connected with the lands to be so allotted, and that the *right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.*[20]
>
> (Emphasis supplied.)

The agreement was ratified by statute in 1906. 34 Stat. 325.[21]

Mr. Antoine and his wife were cited by a State of Washington game protector for shooting and possessing deer in violation of the Washington State game laws.[22]

They were tried in Ferry County District Court on October 18, 1971, and found guilty as charged in an opinion filed by the District Court Judge on November 1, 1971.[23]

Pursuant to state law, Alex Antoine and his wife filed a timely Notice of Appeal to the Superior Court for trial *de novo*.[24]

Trial was held January 14, 1973, before the Honorable Richard J. Ennis, resident judge of the judicial district composed of Lincoln County, State of Washington, sitting *pro tem* for the Ferry County Superior Court, Republic, Washington.[25]

After trial on stipulated facts,[26] appellants' conviction

20. Single App., p. 7.

21. App., p. A-1, (see discussion, *infra*, p. 14).

22. RCW 77.16.020 and 77.16.030. App., p. A-2, 3.

23. District courts are county courts of limited jurisdiction in the State of Washington. See RCW 3.66.060.

24. Superior courts are state courts of general jurisdiction (RCW 2.08.020) to which appeals from districts courts may be made.

25. R. 5.

26. R. 7-9.

for hunting and possession of deer out of season was upheld by the Superior Court, holding that:

> These Indians are bound by the 1891 Agreement which gave the Indians the right to hunt and fish in common with all others. Now, this simply means that the defendant is bound by the state conservation laws as all others are bound.[27]

Judgment and sentence were filed May 19, 1972, finding Mr. Antoine guilty as charged, sentencing him to 30 days, 25 suspended, and his wife, Irene, to 30 days suspended, with one year probation.[28]

Appeal was taken to the Supreme Court of the State of Washington which rendered its Opinion on July 12, 1973, the Court holding that "the Agreement before us . . . is not the supreme law of the land. . . ."[29] and ". . . the federal government was not authorized to curtail the state's right to exercise its police power, . . ."[30]

The Remittitur of the State Supreme Court was filed August 12, 1973, and is hereby appealed from.[31]

At all times in this proceeding, appellants have maintained that the state game laws as applied to them were repugnant to federal law. Specifically, they have maintained that the 1891 agreement constitutes the supreme law of the land and that state game laws must give way to the promises and guarantees of the federal government.

27. R. 24-25.

28. R. 53-54.

29. Single App., p. 30 (82 Wn.2d 440 at 451).

30. Single App., p. 21 (*Op. cit.*, at 443).

31. Single App., p. 36.

SUMMARY OF ARGUMENT

1. Establishment of the Colville Indian Reservation by executive order vested substantial hunting rights in the Colville Tribes. *Menominee v. United States*, 391 U.S. 404 (1968). Those substantial rights are subject to tribal control and the State may not regulate or interfere with the Tribes' exercise of its sovereign power over fishing and hunting affairs within its Reservation. *See, Moore v. United States*, 157 F.2d 760 (9th Cir. 1946) *cert. denied*, 330 U.S. 827 (1947); *Hunt v. United States*, 278 U.S. 96 (1928); *Mason v. Sams*, 5 F.2d 255 (W.D. Wash. 1925). Such rights continue unless explicitly abrogated or terminated by the Congress. *Menominee v. United States*, 391 U.S. 404 (1968).

2. In 1891, half of the Colville Reservation (*i.e.* the northern half) was ceded back to the United States government by an Agreement which provided that the right to hunt and fish on the ceded land ". . . shall not be taken away or in anywise abridged." This Agreement was ratified in 1906 (34 Stat. 325, 377-378). The Agreement is part of the supreme law of the land and binding upon the State of Washington. U.S. Const. Art. VI, cl. 2; *See, Perrin v. United States*, 232 U.S. 478.

3. Agreements with Indians are never to be construed to their prejudice. Rather, how the Agreement would be understood by an unlettered people is the rule of construction. *Worcester v. Georgia*, 6 Pet. 515 (1832). In construing such agreements, one is to look only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence. *Choctaw Nation v. United States*, 119 U.S. 1, 28 (1886). The words of the

1891 Agreement which provide that the Colville rights shall not be taken away or in anywise abridged mean that there is no residual state power or regulation over Indian rights. Regulation of the Colville hunting right would interfere with the exercise of Colville sovereign rights and power over tribal property, wildlife and natural resources and would not leave the tribe free from state jurisdiction and control. *McClanahan v. Arizona*, 411 U.S. 164 (1972).

4. Even if the 1891 Agreement is construed as allowing the state some residual power to regulate Indian hunting as "necessary for conservation" (*See, Puyallup Tribe v. Department of Game*, 391 U.S. 392 (1968), the State's burden in that regard has not been met. To regulate an Indian hunting right, the state must deal with the matter of Indian rights as a subject separate and distinct from that of fishing by others. It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for conservation and that the proposed regulation is the least restrictive which can be imposed consistent with conservation needs. The burden of such facts is on the state. It must regulate the taking of game so that Indians exercising Indian rights will be accorded an opportunity to take, at their usual and accustomed places by means reasonably feasible to them, a fair and equitable share of the resource. *See, Sohappy v. Smith*, 302 F.Supp. 899 (D.C. Ore. 1969) and *United States v. Washington* (D.C. W.D. Wash., Cause No. 9213), Federal Court interpretations of the rule announced in *Puyallup Tribe v. Department of Game, supra*, (Puyallup I). A State regulation which does not recognize superior Indian rights guar-

anteed by federal law in fact discriminate against those Indians. *Department of Game v. Puyallup Tribe*, 414 U.S. 44 (Puyallup II) (1972).

ARGUMENT

This case is of importance not only to Alex and Irene Antoine but to the 500 or more Colville families who live on or near the reservation, many of whom depend upon game for a food source. The action of the state game department and the decision of the Court below destroy vested hunting rights on former reservation lands of these Indians, and throw a cloud on the legality of one of the agreed-on terms of the 1891 Cession Agreement and thus the entire legality of the Cession itself.

The principles announced by the Court below have great significance in the continuing federal-state relationship affecting Indian affairs in the state of Washington. If allowed to stand, they will seriously affect the ability of the federal government to carry out its trust responsibility with regard to its Indian wards in the state.[32]

The principle announced by the state court relegates all federal actions, be they Executive Orders, agreements, statutes, etc., undertaken after the end of the treaty-making power in 1871 to a second class position in federal law. The principles enunciated allow the state court to construe and interpret such federal law according to rules and

32. Virtually every one of the 30-plus tribes and bands in the state of Washington trace their current rights and guarantees to post-1871 federal actions or agreements. For example, the Makah Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Lummi Indian Reservation was established by Executive Order in 1872, 1 Kapp. 917; the Moses Band of Indians and some of the Colville Bands relinquished their previous reservation by agreement in 1883. (23 Stat. 79).

guidelines not heretofore applicable to Indian statutes and agreements.

Those rules and guidelines seriously erode the protection of Indian rights under federal law and, of course, directly block the exercise of federally guaranteed hunting rights by Alex Antoine and other members of the Colville Confederated Tribes.

1. Establishment of an Indian Reservation Vests Hunting Rights in an Indian Tribe Which Are Not Subject to State Control

Alex Antoine's hunting rights in eastern Washington predate, of course, any federal statutes or actions. Agreements made with Indian tribes during the years of western expansion are instruments which recognize and affirm such rights and not instruments which constitute a grant of rights *to* the Indians. *U.S. v. Winans*, 198 U.S. 371, 381 (1905). Before any agreements were made with the Colville Confederated Bands and Tribes, or any reservation set aside for them, hunting was a major source of food and a major activity.[33]

Treaties were never signed with many of the tribes and bands of the interior areas of the state of Washington, including the Okanogan Band of which Mr. Antoine is a member. However, continuing problems between the Indians and settlers and the advance of railroads, etc., led to the removal of many of these bands to reservations in the 1870's.[34]

33. TEIT & BOAS; THE SALISHAN TRIBES OF THE WESTERN PLATEAUS, 45th B.A.E. Annual Report, 1927, (facsimile reproduction by Shorey Bookstore, 1973) at p. 237 and 242.

34. See TEIT & BOAS; *supra*, p. 259. See also; *Report of the Commissioner of Indian Affairs for 1872*: reprinted in WASHBURN, ED, THE AMERICAN INDIAN AND THE UNITED STATES–A DOCUMENTARY HISTORY, Vol. 1, p. 176-179, Smithsonian Institution, Random House, 1973.

Thus, in 1872, the Colville Indian Reservation was established for the use and occupancy of the Methows, Okanogan, San Poil, Lake, Colville, Kalispell and other bands by the President of the United States.[35]

The reservation included an area of more than 3 million acres south of the Canadian border, east of the Okanogan River and north and west of the Columbia River, lying in what is now the eastern half of Okanogan County, all of Ferry County and the northwestern corner of Stevens County in the state of Washington.

It has long been the rule that rights granted or reserved to Indians by the establishment of a reservation by Executive order are as secure and as entitled to paramount protection as are rights reserved by treaty. *Spalding v. Chandler*, 160 U.S. 394 (1896), and *Federal Indian Law*, pages 614-616.[36]

The instrument establishing the reservation need not specifically enumerate hunting rights for such rights to exist. Where no specific mention of the right to hunt and fish was made, ". . . such a reservation was not necessary to preserve the right on land reserved or retained in Indian ownership. The right to hunt and fish was part of the larger rights possessed by the Indians in the lands used and occupied by them. Such right, . . . remains in them unless granted away." *Federal Indian Law*, 496-498, citing Op.

35. Executive Order of July 2, 1872, 1 Kapp. 916 reprinted in Single App., p. 3. Note: The reservation was originally established by Executive Order of April 9, 1872, but that reservation was superseded by the later order of July 2.

36. *Federal Indian Law*, 1958, is a revision of the *Handbook of Federal Indian Law*, prepared by the office of the United States Solicitor under the editorial direction of Felix S. Cohen, Assistant Solicitor, and first printed in 1940. References in this brief are to the 1966 reprinting by the Association on American Indian Affairs, Inc. of the 1958 revision of the *Handbook*.

Act. Sol. M.28107, June 30, 1936. Thus it has been held that where land is merely set aside for Indian use and occupancy, there being no specific mention of hunting or fishing rights, those rights nevertheless are included in the reservation. *Menominee v. United States*, 391 U.S. 404 (1968), *Kimball v. Callahan*, 493 F.2d 564 (1974).

Finally, a tribe possesses full powers of internal sovereignty except as limited by treaty or Act of Congress, *Barnes v. United States*, 205 F.Supp. 97, 100 (D. Mont., 1962); *Federal Indian Law*, 396, 398, and therefore has the power to regulate tribal property (including hunting and fishing rights) and the conduct of its members concerning such property and rights. *Federal Indian Law*, 441.

Tribes may exclude non-members from the reservation and thereby close all portions of the reservation to hunting and fishing by non-Indians. ". . . [T]he tribe has the sovereign power of determining conditions upon which persons shall be permitted to enter its domain, . . ." *Federal Indian Law*, 439, citing 55 I.D. 14, 50 and *Morris v. Hitchcock*, 194 U.S. 384 (1904). *Quechan v. Rowe*, 350 F. Supp. 106 (1972).

Thus the establishment of the Colville Reservation by the Executive Order of 1872 recognized and vested substantial hunting rights in the Colville Confederated Tribes.

The nature and scope of the Indian rights to wildlife on a reservation is nearly absolute *vis-a-vis* the state. A state has no authority to interfere with hunting on federal lands. *Hunt v. United States*, 278 U.S. 96 (1928). Wildlife on a reservation belongs to the Indians as their property. *Mason v. Sams*, 5 F.2d 255 (W.D. Wash., 1925); *Pioneer Packing v. Winslow*, 159 Wash. 655 (1930). Within a res-

ervation, Indians are exempt from state conservation regulations. *Moore v. United States,* 157 F.2d 760 (9th Cir., 1946), *cert. denied,* 330 U.S. 827 (1947). *Kimball v. Callahan,* 493 F.2d 564. And, of course, it is a federal crime to hunt on Indian lands without permission of the Indian owners. 18 U.S.C. § 1165. The state may not interfere with tribal attempts to regulate on-reservation hunting. *Quechan v. Rowe,* 350 F. Supp. 106 (1972).

Clearly, establishment of the Colville Reservation vested substantial and far-reaching hunting rights in the Colville Indians, over which the State of Washington has no control or authority absent relinquishment of those rights by the Indians or abrogation of such rights by the Congress.[37]

2. Colville Hunting Rights on the North Half Are Protected From State Regulation by Federal Law

a. *The 1891 Agreement Between the Federal Government and the Colville Tribes Is the Supreme Law of the Land*

Not long after the Colville Reservation was established, it became the policy of the United States government for a time to purchase as much Indian land as possible and open it to settlement by non-Indians.[38]

In 1890, a commission was formed by congressional act and empowered to negotiate with the Colville Confederated Tribes concerning ". . . the cession of such portion of said reservation as said Indians may be willing to dispose of . . ." (Act of August 19, 1890, 26 Stat. 355).

37. At the time that the rights vested, i.e., 1872, Washington was not yet a state. However, the subsequent fact of statehood does not change the authority or control of the state. A state must accept statehood subject to whatever outstanding rights and guarantees exist at the time of statehood. See *United States v. Winans,* 198 U.S. 371 at 382-84 (1905). See also *Coyle v. Smith,* 321 U.S. 559, 570 (1911) and *Johnson v. Geralds,* 234 U.S. 442, 438-40 (1914); *Metlakatla v. Egan,* 369 U.S. 45, 59 (1962).

38. See, e.g., *Reports of the Commissioner of Indian Affairs for 1890:* reprinted in WASHBURN, *supra,* at p. 435, *et seq.*

Negotiations were carried out[39] and an agreement of sale was entered into on May 9, 1891.[40]

The agreement provided that the Indians would ". . . surrender and relinquish to the United States all their rights, title, claim and interest in and to and over. . . ." approximately 1.5 million acres of the original reservation.[41]

Although the House of Representatives voted to ratify the 1891 agreement (see 23 Cong. Rec. 3840), the Senate rejected the explicit terms of the agreement evidently because of the misconception that the Indians did not have complete title to the reservation. See S. Rep. No. 664, 52d Cong., 1st Sess., page 2. Thus, instead of the 1891 agreement, the Act of July 1, 1892 (27 Stat. 62), was enacted. This Act enacted many of the provisions of the Agreement and provided that the northern half of the Reservation was "vacated and restored to the public domain. . . . (and) opened to settlement. . . ."

Subsequently, however, after much agitation by both the Indians and the Bureau of Indian Affairs,[42] the Con-

39. See Antoine exhibits Nos. 1 and 3, "Minutes of Negotiations." Admitted to evidence, R. 9.

40. Defendants' Exhibits 2 and 4, admitted to evidence, R. 9. See Single App., p. 4.

41. The land so ceded was north of approximately the 48°30' parallel of latitude and south of the Canadian border, generally referred to as the "north half" of the Colville Reservation.

42. The 15-year lobbying attempt of the Indians is outlined in *Butler and Vale v. U.S.,* 43 Ct. Claims Rep. 497 (1908).

gress authorized payment as provided in the 1891 Agreement, noting that the payment was to ". . . carry into effect the Agreement (dated May 9, 1891) entered into between the Indians residing on the Colville Reservation and the Commissioners appointed by the President of the United States. . . ." Act of June 21, 1906 (34 Stat. 325, 377-378) The money authorized in the 1906 Act was appropriated in five subsequent Acts of $300,000 each: 34 Stat. 1015, 1050-1051; 35 Stat. 70, 96; 35 Stat. 781, 813; 36 Stat. 269, 286; 36 Stat. 1058, 1074. Each of these statutes is essentially identical and provides that the appropriation is:

> In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an Act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the Act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one. . . .

34 Stat. 1015, 1050-1051.

A congressional Act relating to Indians is the supreme law of the land, binding on the states. U.S. Const., Art. VI, cl. 2; see *Perrin v. United States*, 232 U.S. 478.[43] Thus the

43. Washington, in assuming limited jurisdiction over Indians under Public Law 83-280, 67 Stat. 588, enacted RCW 37.12.060 which states:

> Nothing in this chapter * * * shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under federal treaty, *agreement*, statute, or Executive Order with respect to Indian land grants, hunting, trapping, or fishing or the control, licensing, or regulation thereof.
> [Emphasis supplied.]

1891 Agreement is binding on the State of Washington.[44]

The 1871 Act ending the treaty power with respect to Indian tribes (23 Stat. 79, 25 U.S.C. §71), did not affect the federal government's exclusive jurisdiction over the Indian tribes, but was only a decision to govern its Indian wards by congressional enactment rather than by treaty. *United States v. Kagama*, 118 U.S. 375, 30 L. Ed. 228, 6 S. Ct. 1109 (1866). The historical circumstances, which made exclusive federal jurisdiction over the Indians necessary, preclude any notion of residual state powers. See *State ex rel. Adams v. Superior Court*, 57 Wn.2d 181, 183 (1960).

Where the federal authority over Indian affairs is already lodged in the federal government it will not be dislodged by a statehood act. See *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 59 (1962).

Agreements made with Indian tribes subsequent to the end of the Indian treaty-making power in 1871 and after a

44. Note that the state argues in its Motion to Dismiss or Affirm that the Colville Reservation was "diminished" by the Act of July 1, 1892. (27 Stat. 62). Whether the reservation was diminished or not seems inapposite here. First, the 1906 Act ratifying the 1891 Agreement, being later than the 1892 Act, clearly supersedes that Act. Secondly, the 1892 Act makes no mention of fishing and hunting rights. Vested fishing and hunting rights of Indians on their reservations are not impaired or abrogated by implication, but must be explicitly terminated by the Congress. *Menominee v. United States*, 391 U.S. 404. The 1892 Act, being silent on the subject can therefore have no effect on fishing and hunting rights. The question of "diminishment" of the reservation by the 1892 Act was discussed in the context of legislation dealing with the present south half of the reservation in *Seymour v. Superintendent*, 368 U.S. 351, and again, tangentially, in *Mattz v. Arnett*, 412 U.S. 481, footnote 22. The other party to the Agreement (i.e., the United States) agrees to its ratification and status as supreme law. See Memorandum for the United States as Amicus Curiae, p. 6. The state, at no time, has contested this view but rather has simply claimed that the agreement is not a "treaty." Mot. to Dismiss, p. 6.

state is admitted to the Union are nevertheless binding and supercede state law.[45] *Dick v. United States*, 208 U.S. 340 (1908).

b. *The "Plain Meaning" of the 1891 Agreement Is That the State of Washington Has No Power to Abridge Colville Hunting Rights*

This Court has provided us with principles to be used in construing agreements with the Indians.

Thus, it has been held:

> The language used in treaties with the Indians should never be construed to their prejudice. . . . How the words of the treaty were understood by this unlettered people rather than their critical meaning should form the rule of construction.

Worcester v. Georgia, 6 Pet. 515 (1832).

It has further been noted that:

> The parties were not on an equal footing and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules framed under a system of municipal jurisprudence formulating the rights and obligations of private persons equally subject to the same laws.

Choctaw Nation v. United States, 119 U.S. 1, 28 (1886); see also *Menominee Tribe v. United States*, 391 U.S. 404, 406 n. 2 (1968).

In *Puyallup Tribe v. Department of Game*, 391 U.S. 392 (*Puyallup I*), this Court construed a clause in the Treaty of Medicine Creek (10 Stat. 1132-1133) which stated:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory • • •.

45. Washington was admitted to the Union in 1889, two years before the Agreement.

The Court, quoting from *United States v. Winans*, 198 U.S. 371, stated (391 U.S. at 397):

> To construe the treaty as giving the Indians "no rights but such as they would have without the treaty" • • • would be "an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the Nation for more."

As a result, the Court held that (391 U.S. at 398):

> The right to fish "at all usual and accustomed" places may, of course, not be qualified by the State • • •. But the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State *in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians.* [Emphasis added.]

"Appropriate standards" refers to a showing that the regulation is a reasonable and necessary conservation measure. See *Tulee v. Washington*, 315 U.S. 681, 684; *Department of Game v. Puyallup Tribe (Puyallup II)*, 414 U.S. 44. As this Court noted in *Puyallup I, supra*, 391 U.S. at 402, n. 14, the standard to be applied is more stringent than the usual federal constitutional standard concerning the scope of the police power of a state. The special rights of the Indians must be accommodated, so long as consistent with preservation of the game in question. See also *Menominee Tribe v. United States*, 391 U.S. 404.

In the present case, however, an analysis of the words of the particular agreement involved and the particular facts of this case leads to the conclusion that there is no

power in the State to regulate the Colville's hunting rights at all. [46]

The *Puyallup* case involved the Treaty of Medicine Creek (10 Stat. 1132-1133) which guaranteed the right to fish and hunt on ceded lands with the following language:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the territory. . . .

The 1891 Agreement with the Colvilles on the other hand, guarantees hunting rights in the ceded areas with the following language:

> . . . the right to hunt and fish in common with all other persons on lands not allotted to said Indians shall not be taken away or in anywise abridged.

(Single Appendix, p. 7)

The language of the 1891 Agreement obviously adds significant protections for the Indian hunting rights. It has the important proviso that the right shall not be "taken away" or "in anywise abridged."

Certainly to close hunting is to "take away" a hunting right. Likewise, anything which in any way reduces, limits, negates, abrogates, or impairs a right is an "abridgement".

To "abridge" clearly means to deprive, to diminish by reducing, to shorten in duration, or cut down in extent. *Websters Third New International Dictionary*, 6 (Unabridged, Ed. 1962). The word "anywise" means "in any way or matter whatsoever: at all," *Websters, supra*, p. 98.

46. The standards announced in Puyallup have been criticized. See *Burnett, Indian Hunting, Fishing and Trapping Rights: The Record and the Controversy*, 7 Idaho Law Review, 49, 68 (1970) and Johnson, *The States v. Indian Off-Reservation Fishing: A United States Supreme Court Error*, 47 Wash. Law Review, 207, 235 (1972).

In a case decided subsequent to *Puyallup I, supra*, the Michigan court found no State power to regulate Indian fishing rights where the treaty in question contained additional language. *People v. Jondreau*, 185 N.W.2d 375, 384 Mich. 539 (1971). The treaty in question in *Jondreau* provided that the Indians ". . . shall have the right to hunt and fish therein (that is, the ceded area) until otherwise ordered by the President." The Michigan Supreme Court found the words "until otherwise ordered by the President" sufficient to preclude any residual State power or regulation over Indian rights.

Secondly, the underlying rationale of *Puyallup I* (391 U.S. 392) appears to be that there is ". . . no reason why the right of the Indians may not also be regulated by an appropriate exercise of the police power of the State . . ." so that the "overriding police power of the State, . . . is preserved." *Puyallup, supra*, pp. 398-399.

Yet State regulation of the Colville hunting right will surely interfere with the power of the tribal government over tribal property and tribal affairs.[47]

Clearly the reservation of hunting rights on the old north half constitutes the reservation of an important tribal property right. The Colville Confederated Tribes are endeavoring to regulate that right and have passed an ordinance governing hunting and fishing on the north half. ..... Fed. Reg. ..... That ordinance provides that the resources to be managed primarily for the purpose of providing food and only secondarily for sport and recreation. The ordi-

47. The Business Council of the Colville Confederated Tribes is empowered by the Constitution of the Tribes in Article 5 "To protect and preserve the tribal property, wildlife and natural resources of the Confederated Tribes, ..."

nance provides for regulating areas, seasons and limits and penalties for violation. ..... Fed. Reg. .....[48]

Allowing State regulation over this important tribal right violates the policy of leaving Indians free from State jurisdiction and control. See *McClanahan v. Arizona*, 411 U.S. 164 (1973). In the present case attempted State regulation of the Colville hunting right clearly infringes on the right of the Confederated Tribes to make their own laws and be ruled by them. *McClanahan, supra*, p. 135.

c. *Denial of Alex Antoine's Hunting Rights Is Not Necessary for Conservation*

Assuming, in the alternative, that the State does have some power to regulate Mr. Antoine's hunting rights, that power has not been properly exercised in the present case.

The Federal District Courts charged with the responsibility of implementing the rule of *Puyallup I*[49] have formulated further principles to aid in that implementation.

Thus, in *Sohappy v. Smith*, 302 F. Supp. 899 (D. Ore. 1969), the court held that the State could regulate Indian rights only if it accomplished the following:

(a) It must establish preliminary to regulation that the specific proposed regulation is both reasonable and necessary for the conservation of the fish resource. In order to be necessary, such regulations must be the least restrictive which can be imposed consistent with assuring the neces-

48. To aid enforcement it should be noted that the tribes maintain a force of game protectors who operate on the south half and a tribal court and tribal law and order code providing proper criminal procedures, etc., are in force.

49. 391 U.S. 392. "The right . . . may not be qualified by the State. . . . But . . . may be regulated by the State in the interest of conservation, provided the regulation meets appropriate standards and does not discriminate against the Indians." at p. 398.

sary escapement of fish for conservation purposes: The burden of establishing such facts is on the State.

(b) Its regulatory agencies must deal with the matter of the Indians' treaty fishing as a subject separate and distinct from that of fishing by others. . . .

(c) It must so regulate the taking of fish that the treaty tribes and their members will be accorded an opportunity to take at their usual and accustomed fishing places, by reasonable means feasible to them, a fair and equitable share of all fish which it permits to be taken from any given run. (*Sohappy, supra*, p. 907)

This approach has been continued and expanded in a major case involving off-reservation fishing rights of the Western Washington Indian tribes. In *U.S., et al v. Washington, et al*, (W.D. Washington, Civil Cause No. 9213), the United States, on its own behalf and as trustee for several Washington Indian tribes brought suit against the State of Washington seeking a declaratory judgment and injunctive relief against the State of Washington as to application of its fish and game laws to the tribes. *U.S. v. Washington*, Final Decision, Feb. 12, 1974, p. 1.[50]

The case represents an attempt by the court to adjudicate the complex issue presented by State attempts to regulate Indian rights guaranteed by federal law.

In attempting to reconcile the concepts of Indian sovereignty and self-government, federally recognized hunting and fishing rights and the rulings of *Puyallup I* and *Puyallup II*, the Federal Court in *U.S. v. Washington* deter-

50. The Federal District Court's Opinion is not reported. A copy of the Final Decision has been lodged with the Clerk's Office. The Cause is presently on appeal to the Ninth Circuit.

mined that the tribes involved in that litigation were "entitled to exercise . . . governmental powers by regulating the treaty right fishing of its members without any State regulation thereof; provided, however, the tribe has and maintain the qualifications and accepts and abides by the conditions stated below." (*U.S. v. Washington*, Final Decision, p. 30) The court then went on to list (Final Decision, p. 31-34) the various qualifications and conditions each tribe would have to meet to regulate its off-reservation rights.[51]

Turning to the issue of State regulation of the off-reservation right, in absence of self-regulation by the tribe, the Federal Court then defined what "conservation" meant:

> However broadly the word may be used and applied in the theory and practice of fisheries science and management, 'conservation' as used in Supreme Court decisions and herein is limited to those measures which are reasonable and necessary to the perpetuation of a particular run or species of fish. In this context, as well as by dictionary definition, 'reasonable' means that a specifically identified conservation measure is appropriate to its purpose; and 'necessary' means that such purpose in addition to being reasonable must be essential to conservation.

U.S. v. Washington, Final Decision, p. 35.

The court then noted that the State had the burden of proof in the matter and that no regulation applied to an off-reservation treaty fishing right could be valid or enforceable unless and until it had been shown reasonable and necessary to conservation as above defined. p. 35.

51. These obligations include governmental, biological and enforcement capability, up-to-date tribal rolls and tribal-state cooperation.

The court then adopted the test outlined by the *Sohappy* court as noted above. (Final Decision, p. 42)

Clearly in the present case the State has not met its burden of proof. It has not, in the words of the *Sohappy* court, established "preliminary to regulation that the specific regulation is both reasonable and necessary for conservation" or that the regulation is the ". . . least restrictive which can be imposed consistent with assuring continued preservation of the resource." *Sohappy v. Smith, supra*, p. 907. The State has not dealt with the matter of Indian rights as a subject separate and distinct from that of fishing and hunting by others. It has not regulated the taking of game so that the members of the tribe will be accorded" . . . an opportunity to take at their usual and accustomed places by reasonable means feasible to them, a fair and equitable share of the resource." *Sohappy, Ibid.* The state has not established ". . . that the regulation is supported by the evidence on grounds of being necessary for the conservation . . ." of the resource. *Dept. of Game v. Puyallup*, 80 Wn.2d 561, 574, 497 P.2d 171 (1972).

In the present case one Indian shot one deer for his personal use. This was done pursuant to rights guaranteed him by agreement with the United States government. The State may not take away that right where it fails to present any evidence whatsoever that such an action is necessary for conservation.

CONCLUSION

Appellant Alexander Antoine shot a deer during closed season under State law. He sought to do so pursuant to rights guaranteed him by an Agreement between his tribe and the United States government signed in 1891. The Agreement, ratified by the Congress in 1906, is the supreme law of the land, is to be construed in favor of the preservation of Indian rights, and supercedes any State laws on the matter.

Prior to the time of the Agreement, the members of Mr. Antoine's tribe possessed exclusive and unrestricted rights to hunt and fish on their reservation. When this land was ceded back to the United States government, the Indians reserved all hunting and fishing rights except their exclusive nature, agreeing to allow the whites to fish and hunt "in common with" them. The plain meaning of the 1891 Agreement (which states that the Indians' hunting rights shall not be "taken away or in anywise abridged") that the State has no power to impair, abridge or restrict those rights.

Even assuming, *arguendo*, State power to regulate as necessary for conservation, the State has not met its burden in that regard and any attempt to enforce such regulations against appellant are invalid.

Respectfully submitted,

ZIONTZ, PIRTLE, MORISSET
& ERNSTOFF
By MASON D. MORISSET
Attorneys for Appellants

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

United States Constitutional Provisions:

United States Constitution, Art. I §8, cl. 3

> "The Congress shall have Power . . . to regulate commerce with foreign Nations, and among the several States and with the Indian Tribes;"

United States Constitution, Art. VI, cl. 2

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Congressional Acts:

Act of June 21, 1906 (34 Stat. 325, at 377)

> To carry into effect the agreement bearing date May ninth, eighteen hundred and ninety-one, entered into between the Indians residing on the Colville Reservation and commissioners appointed by the President of the United States under authority of the act of Congress approved August nineteenth, eighteen hundred and ninety, to negotiate with the Colville and other bands of Indians on said Colville Reservation for the cession of such portion of said reservation as said Indians might be willing to dispose of, there shall be set aside and held in the Treasury of the United States for the use and benefit of said Indians, which shall at all times be subject to the appropriation of Congress and payment to said Indians, in full payment for one million five hundred thousand acres of land opened to settlement by the act of Congress 'To provide for the opening of a part of the Colville Reservation, in the State of Washington, and for other purposes,' approved July first, eighteen hundred and ninety-two, the sum of one million five hundred thousand dollars, . . .

Act of March 1, 1907 (34 Stat. 1015, 1051)

In part payment to the Indians residing on the Colville Reservation for the cession by said Indians to the United States of one million five hundred thousand acres of land opened to settlement by an act of Congress "To provide for the opening of a part of the Colville Reservation in the State of Washington, and for other purposes," approved July first, eighteen hundred and ninety-two, being a part of the full sum set aside and held in the Treasury of the United States in payment for said land under the terms of the act approved June twenty-first, nineteen hundred and six, ratifying the agreement ceding said land to the United States under date of May ninth, eighteen hundred and ninety-one, three hundred thousand dollars, said sum of three hundred thousand dollars to be paid to or expended for the benefit of said Indians under the direction of the Secretary of the Interior.

State Statutes

Revised Code of Washington

77.16.020 ***Taking during closed season—Exceeding bag limits—Taking within reserves.*** It shall be unlawful for any person to hunt, trap, or fish for any game birds, game animals, fur-bearing animals or game fish during the respective closed seasons therefor. It shall also be unlawful for any person to kill, take, or catch any species of game birds, game animals, furbearing animals, or game fish in excess of the number fixed as the bag limit. It shall also be unlawful for any person to hunt or trap for any game birds, game animals, or fur-bearing animals within the boundaries of any game reserve or closed area, and it shall likewise be unlawful for any person to fish for any game fish within any closed waters or within the boundaries of any game fish reserve.

Any person who hunts or traps any elk, moose, antelope, mountain goat, mountain sheep, caribou or deer in violation of this section is guilty of a gross misdemeanor and shall be punished by a fine or not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days

and not more than one year or by both such fine and imprisonment.

Any person who hunts or traps any game bird in violation of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

77.16.030 ***Possession during closed season or in excess of bag limits.*** It shall be unlawful for any person to have in his possession or under his control any game bird, nongame bird, game animal, fur-bearing animal, or game fish, or part thereof, during the closed season or in excess of the bag limit.

Any person who has in his possession or under his control any elk, moose, antelope, mountain goat, mountain sheep, caribou, deer, or parts thereof in violation of the foregoing portion of this section is guilty of a gross misdemeanor and shall be punished by a fine of not less than two hundred fifty dollars and not more than one thousand dollars or by imprisonment in the county jail for not less than thirty days and not more than one year or by both such fine and imprisonment.

Any person who has in his possession or under his control any game bird or part thereof in violation of the foregoing portion of this section is guilty of a misdemeanor and shall be punished by a fine of not less than twenty-five dollars and not more than one hundred dollars or by imprisonment in the county jail for not less than ten days and not more than thirty days or by both such fine and imprisonment.

Provided, That any person who has lawfully acquired possession of any game bird, game animal, or game fish, or part thereof, and who desires to retain it for human consumption or ornamental purposes, or desires to sell the skin, hide, horns, head, or plumage thereof, after the close of the season may do so in accordance with the rules and regulations of the commission.

Provided, further, That the owner of any game bird, nongame bird, game animal, fur-bearing animal, or game fish, who has lawfully propagated it or purchased from one who has so propagated it, may possess, ship, sell or otherwise dispose of such bird, animal or fish, when properly tagged or sealed.